

### **REMARKS**

All amendments and withdrawals are made without prejudice or disclaimer. Applicants reserve the right to pursue withdrawn, canceled or amended subject matter in this or related patent applications.

Claims 1-56 are subject to restriction requirement. The Examiner allegedly identified two inventions as follows:

- I. Claims 1 and 2, drawn to methods of monitoring a treatment site, classified in Class 128, subclass 898; and
- II. Claims 3-56, drawn to tissue treatment apparatuses, classified in Class 606, subclass 12.

The Examiner also alleges that the inventions are independent or distinct, each from the other, because of the following reasons:

The Examiner states that inventions I and II are related as process and apparatus for its practice. The Examiner asserts that the inventions are distinct if it can be shown that either: (1) the process as claimed can be practiced by another and materially different apparatus or by hand, or (2) the apparatus as claimed can be used to practice another and materially different process. (MPEP § 806.05(e)). The Examiner alleges that in this case other and materially different apparatuses, such imaging apparatus, can be used for monitoring a treatment site, and that moreover, a surgeon or operator can visually monitor a treatment site without measuring its temperature.

The Examiner alleges that because these inventions are distinct for these reasons and have acquired a separate status in the art as shown by their different classification and/or recognized divergent subject matter and/or requirements for a different field of search. The Examiner continues that, further, the prior art applicable to one invention would not likely be applicable to another invention, and the two inventions are likely to raise different non-prior art issues.

Because of this argument, the Examiner requires restriction between these product and process claims. As seen below, the Applicants have elected claims directed at a product. Therefore, Applicants request that if the product claims are subsequently found allowable, the withdrawn process claims that depend from or otherwise include all the limitations of the allowable product claim(s) be rejoined in accordance with the provisions of MPEP 5 821.04.

In the event of rejoinder, Applicants understand that the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104.

The Examiner also requires election of species for prosecution on the merits to which the claims will be restricted if no generic claim is allowed. The Examiner alleges that the following patentably distinct species exist: A (claims 3-6), B (claims 7-17) and C (claims 18-56). The Examiner additionally alleges that species B contains patentably distinct sub-species a-e, citing to claims 10 through 13, and that species C contains patentably distinct sub-species a-e, citing to claims 19-23.

The Examiner alleges that these species are independent or distinct because they recite mutually exclusive characteristics of such species. The Examiner further alleges that these species are not obvious variants of each other based on the current record. The Examiner requires Applicants elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. The Examiner further alleges that, currently, no claim is generic.

The Examiner asserts that there is an examination and search burden for these patentably distinct species due to their mutually exclusive characteristics, and that the species require a different field of search, and further that the prior art applicable to one species would not likely be applicable to another species; and/or the species are likely to raise different issues under 35 U.S.C. 101 and/or 35 U.S.C. 112, first paragraph.

Applicants traverse the election of species and subspecies. Applicants contend that the Examiner fails to establish that a serious search burden exists, especially with regard to the subspecies. However, Applicants understand that the Examiner may require an election of species for the purposes of examination. Therefore, Applicant elects the species and subspecies as set forth below for examination purposes, but requests that the Examiner extend the search to the generic claims should the Examiner not find any prior art against the elected species.

### Election of Claims

Applicants elect invention II, claims 3-56. Applicants further elect species C, claims 18-56; regarding the subspecies election, Applicants elect the subspecies corresponding with claim 22 (i.e., a mechanical effect).

### Cancellation and Withdrawal of Claims

Applicants withdraw claims 1 through 17, as well as claims 19, 20, 21, and 23. Claims 18, 22, and 24 through 56 are currently pending. Applicants reserve the right to prosecute the non-elected claims, withdrawn subject matter or canceled subject matter in other continuation or divisional patent applications filed at a later date.

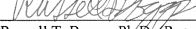
### **CONCLUSION**

It is submitted that the present application is in form for allowance, and such action is respectfully requested.

The Commissioner is authorized to charge any additional fees which may be required, including petition fees and extension of time fees, to Deposit Account No. 08-1641 (Docket No. 39228-0016).

Respectfully submitted,

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